where the verdict is perverse. Otherwise, the trial Judge will be in an awkward position when there is an appeal against acquittal. On the one hand, he has to connive with the Jury's perverse verdict of "not guilty of any offence" and record an order of acquittal, and yet on appeal against the said acquittal, he has to write a judgment agreeing that he is wrong in making such order. In the face of such impossible position, I think, with effect from January 23, 1976, it is only mandatory for the Judge to record an order of acquittal under section 229 Criminal Procedure Code where the Jury's verdict is not perverse.

Be that as it may, I think the Accused has no right of appeal in this case. In *Public Prosecutor* v. *Lim Cheng Chooi*[5], the Public Prosecutor appealed against the decision of the High Court wherein the trial Judge had amended the charge from an offence under section 304 of the Penal Code to one under section 304A of the same code and sentenced the respondent to a fine of $2,000/- in default three months imprisonment. The Federal Court dismissed the appeal without going into its merits on the ground that under sub-section (2A) of section 50, Courts of Judicature Act, an appeal by the Public Prosecutor shall be only against either acquittal or sentence. As such, the decision of the trial Judge in reducing the charge from section 304 to section 304A Penal Code was held not appealable. Similarly, I am of the view the present appeal is untenable on the ground the Appellant can only appeal against conviction or sentence or both under the provision of sub-section 2 of section 50 Courts of Judicature Act 1964 (Revised 1972), the relevant part of which provides:

"An appeal by a person convicted shall be either against the conviction or against the sentence or against both ..."

In this case, the Appellant is not a convicted person and, as such, there is no right of appeal. Even if he can be considered as a convicted person, his right of appeal is limited – against conviction or sentence or against both. As there is no conviction or sentence to be appealed against, the present appeal is untenable.

Appeal untenable.

PUBLIC PROSECUTOR v. ABDULLAH BIN ISMAIL

[A.Cr. J. (Seah J.) September 18, 1982]
[Kuching – Criminal Appeal No. KG 9 of 1982]

Criminal Law and Procedure – Summary trial – Procedure at end of prosecution case – Test of prima facie case – Charge of attempted rape – Evidence given by complainant not inherently incredible – Criminal Procedure Code, section 173(f).

In this case the respondent was charged with attempted rape. The learned President of the Sessions Court acquitted him and he stated –

"At the close of the case for the prosecution it is the duty of the court to determine whether or not the evidence tendered by the prosecution, if unrebutted, has established the case against the accused beyond all reasonable doubt. Before calling upon the accused to make his defence, the court has only to be satisfied that the prosecution has made out a *prima facie* case against him".

The Public Prosecutor appealed.

Held: (1) the learned President of the Sessions Court had applied the wrong test. At the close of the prosecution case the test of a *prima facie* case is not "Has the prosecution evidence established the case against the accused beyond a reasonable doubt?" but rather "If I were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt?";

(2) The evidence of the complainant in this case could not be said to be so inherently incredible as to be incapable of belief by a reasonable person and therefore in this case a *prima facie* case had been made out by the prosecution evidence which if unrebutted would warrant the conviction of the accused as charged;

(3) the order of discharge and acquittal should be set aside and the case remitted to the President of the Sessions Court for him to call upon the accused for his defence.

Cases referred to:

(1) *A. Ragunathan* v. *Pendakwa Raya* [1982] 1 M.L.J. 139.
(2) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(3) *Ong Kiang Kek* v. *Public Prosecutor* [1970] 2 M.L.J. 283.

CRIMINAL APPEAL.

Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the appellant.
Respondent in person.

Cur. Adv. Vult.

Seah J.: This is an appeal by the Public Prosecutor against the decision of the President of the Sessions Court at Kuching dated February 27,

1982 discharging and acquitting the accused, Abdullah bin Ismail, at the close of the prosecution case.

Now section 173(f) of the Criminal Procedure Code reads:

"If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal."

In the case of *A. Ragunathan* v. *Pendakwa Raya*[1] Raja Azlan Shah Ag. L.P. said at p. 141:

"The section is similar to section 188 of the Singapore Criminal Procedure Code (Amendment) Act 1976 which the Privy Council has recently given judicial interpretation in *Haw Tua Tau* v. *Public Prosecutor*[2]."

At p. 51 Lord Diplock said:

"The crucial words in section 188(1) are the words 'if unrebutted", which made the question that the court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words "if unrebutted" refer. What they mean is that for the purpose of reaching the decision called for by section 188(1) the court must act on the presumption (a) that all such evidence of primary facts is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses."

Then His Lordship proceeded to expound the approach to be adopted and at p. 52 His Lordship continued:

"In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of facts are vested in a single judge (or in 2 judges trying capital cases). At the conclusion of the prosecution case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction" within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance."

Continuing Lord Diplock observed that "their Lordships have dealt with its interpretation (section 188(1)) at some length because in the judgment of the Court of Criminal Appeal of Singapore in the case of *Ong Kiang Kek* v. *Public Prosecutor*[3] there are certain passages that seem, upon a literal reading, to suggest that unless at the end of the prosecution case the evidence adduced has already satisfied the judge beyond a reasonable doubt that the accused is guilty, the judge must order his acquittal. But this can hardly have been what that court intended, for it ignores the presence in the section of the crucial words "if unrebutted", to which in other passages the court refers, and it converts the hypothetical question of law which the judge has to ask himself at that stage of the proceeding:

"If I were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt?" into an actual and quite different question of fact: "Has the prosecution evidence already done so?" For the reasons already discussed their Lordships consider this to be incorrect statement of the effect of section 188(1)."

The Federal Court in the case of *A. Ragunathan* v. *Pendakwa Raya (supra)* adopts without dissent the construction given by the Privy Council to section 188(1) of the Singapore C.P.C. and applied it to section 173(f) of our C.P.C.

In the first paragraph of his ruling the President of the Sessions Court said:

"At the close of the case for the prosecution, it is the duty of the court to determine whether or not the evidence tendered by the prosecution, if unrebutted, has established the case against the accused beyond all reasonable doubt. Before calling upon the accused to make his defence, the court has only to be satisfied that the prosecution has made out a *prima facie* case against him."

In short, the President had applied the test that in order to constitute a *prima facie* case the prosecution must have adduced evidence, which at the close of the prosecution case, must satisfy the trial court that the case against the accused has been proved beyond a reasonable doubt. This test has had been adopted in Sarawak after the Criminal Procedure Code (P.M.S. Cap. 6) had been extended

here with effect from January 10, 1976. Now the Privy Council has ruled that was the wrong test to be applied and the Federal Court had adopted the test expounded by the Privy Council in the case of *A. Ragunathan* v. *Pendakwa Raya (supra).* In the High Court I am bound by the ruling of the Federal Court.

Applying this test to the case under appeal I am constrained to hold that the President of the Sessions Courts had applied the wrong test. At the close of the prosecution case the test of a *prima facie* case is not "Has the prosecution evidence established the case against the accused beyond a reasonable doubt?" but rather "If I were to accept the prosecution evidence as accurate would it establish the case against the accused beyond a reasonable doubt?"

Without going into details the salient points given by the complainant, Rebuyah binti Chie (P.W.6) are these:

(a) The accused is her brother-in-law. Both the accused and his wife live in the same house as the complainant and her parents.

(b) On the night of May 27, 1981 the complainant went to bed wearing a long-pants and baju-kurong. Her panty was on. The accused entered her bedroom.

(c) She alleged that the accused pulled down her longpants and panty. After pulling off his underpants the accused laid on top of her and tried to have sexual intercourse with her against her will. Accused placed a pillow on her mouth to prevent her from shouting. She struggled by using her legs to kick her bed. She felt that the accused's private part was about to enter her private part on a number of times.

(d) Because of the noise the father of the complainant went to investigate and found the accused in complainant's room wearing only an underpant.

(e) The complainant was subsequently examined by a doctor who found some bruises surrounding the lower part of the hymen. The doctor also found she has an extra globe below the clitoris thereby obstructing her vagina. Smears and swabs were taken and the doctor discovered spermotozoa present.

In a charge of attempted rape the essential ingredients which constitute the charge are:—

(a) attempted sexual intercourse and

(b) without the consent of the complainant.

The complainant was about fifteen years of age at the time of the alleged offence and her testimony is simple and straightforward. Her evidence cannot be said to be so inherently incredible as to be incapable of belief by a reasonable person, having regard to the evidence of the doctor. Besides the essential elements are not lacking and the accused was found in her bedroom wearing only an underpant and at an unearthly hour. Applying the test expounded by Raja Azlan Shah Ag. L.P. in *A. Ragunathan case* I am constrained to rule that a *prima facie* case had been made out by the prosecution evidence which if unrebutted would warrant the conviction of the accused as charged. I therefore set aside the order of discharge and acquittal and order the President of the Sessions Court, Kuching to call upon the accused to enter upon his defence.

The appeal is therefore allowed.

Appeal allowed.

ONGKONG ANAK SALLEH v. DAVID PANGGAU SANDIN & ANOR.

[O.C.J. (Seah J.) September 24, 1982]
[Kuching – Originating Motion No. MR 1 of 1982]

Administrative Law – Application for order that Native Court hear and determine application – Meaning of "court subordinate to the High Court" – Whether native court is a court subordinate to the High Court – Native Courts Ordinance – Subordinate Courts Act, 1948 – Specific Relief Act 1950, section. 44 – Federal Constitution, Article 74.

Jurisdiction- District Native Court – Not subordinate to High Court – High Court has no supervisory powers over it.

In this case the applicant applied for an order under section 44 of the Specific Relief Act, 1950, that the District Native Court do hear and determine the application of the applicant for extension of time to lodge an appeal.

Held: (1) the District Native Court is not a court subordinate to the High Court and the High Court does not exercise supervisory power over it;

(2) the High Court has therefor no jurisdiction to entertain the motion of the applicant.

Case referred to:

(1) *G.H. Slot & Co Ltd.* v. *Registrar of Trade Marks, S.S.* [1939] M.L.J. Rep. @ p. 213; [1939] M.L.J. 276.